

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
R. Griffin, PJ, D. Owens, B. Schuette, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-v-

SC Docket No. 124055

LEONARD LAMONT STEWART,
Defendant-Appellant.

Court of Appeals No. 243562

Circuit Court No. 94-010039-FC

BRIEF ON APPEAL - APPELLEE

ORAL ARGUMENT REQUESTED

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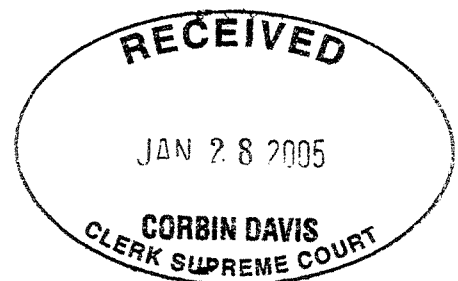


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COUNTERSTATEMENT OF QUESTIONS INVOLVED

I

Cooperation means working together for a shared purpose. Therefore, under the parole statute, a defendant must work together with law enforcement for a common purpose. Moreover, under additional terms of the statute, cooperation must be "relevant and useful." In this case, did Defendant's claim of cooperation more than eight years after sentencing constitute "cooperation" under the terms of the parole statute?

Defendant-Appellant says "YES".

The People-Appellee say "NO".

Trial court said "NO".

Court of Appeals said "NO".

II

Does the parole eligibility statute by its terms impose temporal limitations by requiring that cooperation occur before a judicial determination is made and by indicating that cooperation with law enforcement must be timely by providing that information must be relevant and useful, while not limiting when the sentencing judge must make a determination of cooperation?

Defendant-Appellant says YES in part and NO in part.

The People-Appellee say "YES".

Trial court did not address.

Court of Appeals did not address.

COUNTERSTATEMENT OF FACTS

Trial Proceedings & Evidence

Trial testimony, in May of 1995, revealed that on November 29, 1994, Defendant contacted David Harrell at Harrell's home at 925 Emerson in the City of Saginaw. Defendant asked if he could have something delivered there. (19b-20b) After Harrell said yes, Defendant made a telephone call and Harrell heard Defendant state the address and that something could be sent there. (20b)

Also on November 29, 1994, the Saginaw Police received information that a UPS package destined for Saginaw, Michigan had been identified in California by a drug canine. (52 b) California authorities found the return street address in Ponomo, California, and the name listed on the package were non-existent. (53b, 70b-71b) Based upon the information from California, the package was intercepted when it arrived in Saginaw and a search warrant was issued for the package - addressed to "John Tatum", 925 Emerson, Saginaw MI. (41b-42b) A field test of the package contents in Saginaw revealed the presence of cocaine. (42b-43b) Officers made a controlled delivery of the package to the listed address at 925 Emerson in the City of Saginaw, where it was received and signed for by David Harrell. (13b-15b, 25b-26b) Officers then executed a search warrant for the house where David Harrell was found to be present with the package. Harrell agreed to cooperate with police and told them he was supposed to page someone when the package arrived. (26b, 56b-59b) A call was placed to the pager and about 15 minutes later, Co-defendant Bryan Fields arrived and asked for the package. (27b) When Fields walked into the residence, officers yelled

"Police, freeze." Co-defendant Fields turned and ran before being apprehended with two rocks of crack cocaine, wrapped in cash, in his pocket. (29b, 57b-58b) Approximately ½ hour after Fields arrived to pick up the package, the pager he was carrying went off. The pager was registered to Defendant Stewart and the number showing up for the page was recorded. The same number came through on the pager two more times. The number was later confirmed to be Defendant Stewart's home telephone number. (36b-38b, 59b-61b, 72b) Numerous calls from Defendant's home phone to California, including several call to Ponomo, were also documented.(61b-64b)

David Harrell testified that he had known Defendant for about 1½ years, and that he received packages for him three different times over a period of 8 to 12 months. (19b) Defendant paid Harrell \$100 the first time, and \$50 for each of the other package deliveries. (32b-33b) Defendant would also provide cocaine to Harrell if he asked for it. (33b) Harrell explained that he was contacted by Defendant on November 29, 1994, about accepting a package. On November 30, 1994, Defendant stopped by Harrell's home on Emerson several times before a package was actually delivered. The second time, Defendant stopped, Bryan Fields was with Defendant. Defendant told Harrell to page Fields when the package arrived. (21b-22b, 34b) Harrell was in the process of paging Fields when the police arrived on November 30th. (26b)

In a search of Defendant's residence on the same date, police seized a number of photographs of Defendant and his family - taken at different times, holding large

sums of cash. They also seized an empty box for a digital scale, an address book with a listing for Ponomo, California, and a calendar noting, "Leonard got an ace." (61b-65b, 72b)

Expert testimony established that:

- the package seized from Harrell's residence contained 998.9 grams (more than 2 pounds) of a substance containing cocaine that was 96 per cent pure cocaine (10b-11b, 60b-65b, 72b);
- the cost of a kilogram of cocaine would range from \$30, 000 to \$35,000 and could be sold for \$90,000 to \$400,000 - depending on its form(51b-52b, 65b-68b);
- the term "ace" is used in the drug trade for an ounce of cocaine (51b-52b, 65b);
- the packaging, procedures, and amount of cocaine in this case reflected a distribution scheme (51b-52b, 66b-69b);
- the packaging and delivery to a fictitious person from a fictitious or non-existent person and fictitious or non-existent address was consistent with a mid-level distributor or distribution scheme (51b-52b, 66b-67b) .

Verdict

On May 24, 1995, Defendant was found guilty of:

- Possession with intent to deliver 650 grams or more of a controlled substance - cocaine, and
- Conspiracy to commit the crime of possession with intent to deliver cocaine over 650 grams. (1b-2b, 72b)

Post-trial proceedings

Sentencing

A presentence report was prepared that included Defendant's description of the offense indicating that he had "nothing" to say, that he claimed he was "being framed" and that he knew the police "let the perpetrators get away scott free." (72b) At

sentencing, Defendant simply reiterated his claim that he had been framed and indicated that he had nothing else to tell the court.(11a) Defendant was sentenced on June 19, 1995, to consecutive terms of life in prison without the possibility of parole.(3a; 3b)

Post-conviction Motions and Appeals

Defendant filed an appeal of right and his convictions were affirmed by the Court of Appeals in 1997. This Court denied Defendant's delayed application for leave in 1998.(4b)

In 2001, Defendant filed a motion for relief from judgment in the circuit court seeking a new trial and claiming ineffective assistance of counsel.(4b) The motion was denied and Defendant filed an appeal. In April of 2002, the Court of Appeals denied that application for leave, noting that Defendant failed to meet his burden of establishing entitlement to relief under MCR 6.5008(D).(4b) In December of 2002, the Michigan Supreme Court denied Defendant's application for leave to appeal the decision on his motion for relief from judgment.(5b)

In August of 2002, Defendant filed a motion for certification of cooperation pursuant to MCL 791.234(10), in the circuit court. In his motion Defendant asserted that "he had no useful or relevant information to provide previously" and his "co-defendant's had provided such information prior to Defendant's arrest." He also asserted in this August, 2002 motion, that he was "ready and willing to proffer any relevant or useful information that he may have and would welcome an interview."

Finally, he claimed that he "essentially cooperated with law enforcement to the extent possible, after his initial arrest." (13a-13b)

Contrary to the assertion in Defendant's brief that he would be eligible for parole in 15 years if he was entitled to relief under the parole eligibility statute - because he has another conviction for a serious crime (Conspiracy) he would not be eligible for consideration until 17 1/2 years.

Decisions and Orders

On August 13, 2002, the Circuit Court denied Defendant's motion for certification of cooperation. (2a-4a; 4b) In May of 2003, the Court of Appeals denied this second application for leave arising from Defendant's motion. (2a; 5b) In June of 2004, however, this Court granted Defendant's application for leave to appeal the May 21, 2003, Order of the Court of Appeals. (2a; 5b)

In granting Defendant's application for leave, this Court directed that the following issues be addressed:

- 1 - What constitutes cooperation for the purpose of MCL 791.234(10) and did Defendant's actions in this case satisfy that requirement?
- 2 - Does MCL 791.234(10) contain a temporal limitation on when cooperation must occur?
- 3 - Does MCL 791.234(10) contain a temporal limitation on when a court may make a determination that cooperation occurred?
- 4 - Was *People v Matelic*, 249 Mich App 1 (2001), properly decided?
- 5 - Should this case be remanded to the Saginaw Circuit Court for an evidentiary hearing on whether Defendant cooperated within the meaning of MCL 791.234(10)? (73b)

ARGUMENT I

Cooperation means working together for a shared purpose. Therefore, under the parole statute, a defendant must work together with law enforcement for a common purpose. Moreover, under additional terms of the statute, cooperation must be "relevant and useful." In this case, Defendant's claim of cooperation more than eight years after sentencing does not constitute "cooperation" under the terms of the parole statute.

A. DEFENDANT'S CLAIM

Defendant claims that due process and equal protection of law entitle him to judicial certification of cooperation pursuant to MCL 791.234(10). (DB 4-9)

B. ISSUE PRESERVATION & STANDARD OF REVIEW

Issue preservation

The court rules establish specific procedures for pursuing post-conviction relief when review under the normal appeal rules does not apply. Under MCR 6.502 (C), for post-conviction relief beyond the normal appeal, a defendant must specify whether any of the grounds for the relief requested were raised before - if so, at what stage of the case, and if not, the reasons they were not raised.¹ Under MCR 6.508, a court may not grant relief to the defendant if the motion alleges grounds for relief, other than jurisdictional defects, which could have been raised in a prior motion for relief from judgment, unless the defendant demonstrates good cause for failure to raise such grounds on appeal.²

¹ MCR 6.502(C)(14) .

² MCR 6.508 (D).

In the present case, Defendant brought his motion for judicial certification of cooperation in August of 2002, based upon the 1998 statutory provision for parole eligibility, after his 2001 motion for relief from judgment was denied. (4b-5b) Defendant has not properly preserved the parole eligibility issue because it could have been raised in his 2001 motion for relief from judgment. It was not and Defendant has not established good cause for failure to do so.

Standard of Review

The People agree that issues of statutory interpretation are reviewed de novo, as are constitutional issues.³

C. ADDITIONAL LAW & ARGUMENT

Parole - Equal protection & Due Process

Prisoners have "no constitutional or inherent right" to parole or a parole hearing.⁴ Legislation or government actions, such as those establishing parole prerequisites, are presumed valid if the classification of groups is rationally related to a legitimate state interest.⁵ Our Court of Appeals addressed a defendant's constitutional claims in relation to sentencing credit for prisoners and concluded that due process and equal protection rights were not violated by statutes

³ *People v Chavis*, 468 Mich 84, 92, 658 NW2d 469 (2003); *People v White*, 212 Mich App 298, 304, 536 NW2d 876 (1995).

⁴ *See Greenholtz v Inmates of Neb Penal & Correctional Complex*, 442 US 1, 7, 99 SCt 2100, 60 L Ed 2d 668 (1979); *Glover v Parole Bd*, 460 Mich 511, 596 NW2d 598 (1999).

establishing different categories for parole eligibility.⁶ A state simply has no duty to provide parole for all categories of convicted persons and the state may place conditions on parole release.⁷ Similarly, this Court, in *People v Merriweather*, found no basis to conclude that the legislature intended that all defendants must be eligible for parole.⁸ Moreover, the state has a legitimate public safety interest in parole eligibility limitations or restrictions.⁹

In the present case, Defendant has not established any violation of equal protection or a due process rights.

Statutory interpretation principles

As this Court has repeatedly recognized, the goal when interpreting a statute is to ascertain and give effect to the intent of the Legislature - looking first to the plain language of the statute to determine the legislative intent that may

⁵ See *City of Cleburne v Cleburne Living Ctr*, 473 US 432, 440, 105 SCt 3249, 87 L Ed 2d 313 (1985); *Hawkins v Dept of Corrections*, 219 Mich App 523, 527, 557 NW2d 138 (1996).

⁶ *Hawkins, supra*, 219 Mich App at 528.

⁷ *Board of Pardons v Allen*, 482 US 369, 377 n8, 107 SCt 2415, 96 L Ed 2d 303 (1987); *Lee v Withrow*, 76 F Supp 2d 789, 792 (ED MI 1999).

⁸ *People v Merriweather*, 447 Mich 799, 809, 527 NW2d 460 (1994).

⁹ *Hawkins, supra*, 219 Mich App at 528. See also *Lee v Withrow, supra*, 76 F Supp 2d at 793 (parole system serves public interest purposes of rehabilitation and deterrence).

reasonably be inferred from the words used in the statute.¹⁰ The words used by the legislature must be given their common ordinary meaning.¹¹ As this Court has also recognized, every word must be presumed to have some meaning and the Court should avoid any construction that would render any part of the statute surplusage or nugatory.¹² Thus, effect should be given to each provision of the statute so that the language of a statute is considered in light of the express language found in other sections of the same statute.¹³ If the language is clear and unambiguous, no further construction is necessary, and the statute is enforced as written.¹⁴

Ambiguity is a finding of last resort.¹⁵ But where ambiguity is found, such as where one part of a statute points to one conclusion, while another part points elsewhere, the purpose and context of the statute may be considered.¹⁶ Where there

¹⁰ *Chavis, supra*, 468 Mich at 92; *People v Koonce*, 466 Mich 515, 518, 648 NW2d 153 (2002); *People v McIntire*, 461 Mich 147, 152, 599 NW2d 102 (1999).

¹¹ *See McIntire, supra*, 461 Mich at 153; MCL 8.3a.

¹² *Mayor of the City of Lansing v Michigan Pub Service Comm*, 470 Mich 154, 168, 680 NW2d 840 (2004); *People v Borchard-Ruhland*, 460 Mich 278, 285, 597 NW2d 1 (1991).

¹³ *Borchard-Ruhland, supra*, 460 Mich at 285; *People v Hall*, 391 Mich 175, 190, 215 NW2d 166 (1974).

¹⁴ *Chavis, supra*, 468 Mich at 92; *People v Stone*, 463 Mich 558, 562, 621 NW2d 702 (2001).

¹⁵ *Lansing v MPSC, supra*, 470 Mich at 165 n6.

¹⁶ *McIntire, supra*, 461 Mich at 156 n9.

is ambiguity, the court may look outside the statute to discern the legislature's intent.¹⁷

The parole statute - MCL 791.234 and the 650-drug lifer law

The parole eligibility statute - MCL 791.234 - is part of the Michigan Corrections Code.¹⁸ In 1998, the parole eligibility statute was amended to provide parole eligibility for individuals sentenced to a mandatory life term for a major controlled substance offense under MCL 333.7401(2)(a)(i) (often referred to as the "650-drug lifer law.")¹⁹ The 1998 change coincided with a change in the penalty provision for MCL 333.7401(2)(a)(i), from life without parole, to life or any term of years not less than 20.²⁰

Section six of the statute directs the parole board to determine a prisoner's parole eligibility based upon various factors so that parole eligibility may occur after

¹⁷ *People v Morey*, 461 Mich 325, 330, 603 NW2d 250 (1999).

¹⁸ MCL 791.234; MCL 333.7401(2)(a)(i).

¹⁹ MCL 791.234 (6); Second Analysis: HB 4065-Public Act 319 of 1998, SB 281-Public Act 314 of 1998 (1/26/99), First Analysis SB 280 & SB 281-Public Act 314 of 1998 (12/4/97) [<http://www.michigan.legislature.org>].

²⁰ MCL 333.7401(2)(a)(i). *See also* Thomas, *Criminal Procedure-Parole Eligibility-Michigan Eliminates Mandatory Drug Sentences and Allows Parole for Possession of 650 or More Grams of Cocaine or Heroin*, 76 U Det Mercy L Rev 679, 687-688 (1999)(discussion of background and 1998 changes to drug lifer law and parole eligibility).

20 years or 17 ½ years, depending on whether the prisoner has another conviction for a serious crime.²¹

Section ten of the parole eligibility statute for 650-lifers provides earlier parole eligibility for certain offenders who have cooperated with law enforcement:

If the sentencing judge, or his or her successor in office, determines on the record that a prisoner described in subsection (6) sentenced to imprisonment for life for violating or conspiring to violate section 7401(2)(a)(i) of the public health code, 1978 PA 368, MCL 333.7401, has cooperated with law enforcement, the prisoner is subject to the jurisdiction of the parole board and may be released on parole as provided in subsection (6), 2- 1/2 years earlier than the time otherwise indicated in subsection (6). The prisoner is considered to have cooperated with law enforcement if the court determines on the record that the prisoner had no relevant or useful information to provide. The court shall not make a determination that the prisoner failed or refused to cooperate with law enforcement on grounds that the defendant exercised his or her constitutional right to trial by jury. If the court determines at sentencing that the defendant cooperated with law enforcement, the court shall include its determination in the judgment of sentence.²²

Thus, where a defendant has been convicted and sentenced to life imprisonment for violating or conspiring to violate MCL 333.7401(2)(a)(i), parole consideration may be expedited by 2½ years.

By statute, the "release of a prisoner on parole shall be granted solely upon the initiative of the parole board."²³ The trial judge merely certifies cooperation; the decision is still left to the parole board.

²¹ MCL 791.234(6).

²² MCL 791.234(10).

Cooperation has a clearly understood meaning

The *Cambridge Dictionary of American English* describes "cooperate" as a verb, meaning:

to act or work together for a shared purpose, or to help willingly when asked.²⁴

In *People v Hayes*, this Court addressing an insanity defense issue considered the meaning of the term "cooperation" in relation to the insanity statute.²⁵ The *Hayes* Court after noting the dictionary definition for "cooperate", found that "the term 'cooperate' has a clearly understood meaning". The dictionary definition for "cooperate" recognized in *Hayes*, states that cooperate means:

to act or work with another or others to a common end: operate jointly ... to act together: produce an effect jointly....²⁶

Similarly, the Court of Appeals in *People v Matelic*, looked to a dictionary definition for "cooperate", and found working or acting "together" or "jointly", and "active assistance" described.²⁷

²³ MCL 791.2359(1)(a); *Lee v Withrow*, *supra*, 76 F Supp 2d at 793.

²⁴ *Cambridge Dictionary of American English* (Cambridge University Press 2004)/Cambridge Dictionaries Online [<http://dictionary.cambridge.org/define>].

²⁵ *People v Hayes*, 421 Mich 271, 284-285, 364 NW2d 635 (1984).

²⁶ *Id.* at 285 n6, quoting the Court of Appeals and *Webster's Third New International Dictionary*, p 501 (Unabridged, 1970).

²⁷ *People v Matelic*, 249 Mich App 1, 14, 641 NW2d 252 (2001), citing *The Random House Dictionary of the English Language: Unabridged Edition*, p 321 (1971).

In *People v Cardenas*, a Court of Appeals special panel was convened to to resolve the conflict between a prior opinion in the *Cardenas* case and the opinion in *People v Matelic*.²⁸ The *Cardenas* special panel found that that the statutory language refers to a completed act:

The Legislature's use of "have" and "has" as present perfect tense verbs and its use of past tense verbs demonstrate the Legislature's intent.

* * *

Giving the phrases "has cooperated" and "have cooperated" their plain meaning, then, it is clear that the Legislature intended that the prisoner's cooperation must have occurred at some time before the prisoner's application for parole release under MCL 791.234(10).²⁹

Thus, the term "cooperated" is not ambiguous. Although the time and nature of cooperation appear to be ambiguous under the parole statute, consideration of all the statutory terms and provisions reveals limitations that can be reasonably inferred from the words of the statute.

In addition, a finding that the language is ambiguous makes consideration

Cooperation under the parole statute must be timely in order to be relevant and useful to law enforcement

The parole eligibility statute does not specifically set out a time cutoff in terms of years or months, before or after sentencing.³⁰ A time limitation is, however,

²⁸ *People v Cardenas*, 263 Mich App 511, 688 NW2d 544 (2004), citing the earlier decision *People v Cardenas*, 260 Mich App 801, 684 NW2d 882 (February 24, 2004 vacated March 22, 2004), and *People v Matelic*, 249 Mich App 1, 14, 641 NW2d 252 (2001).

²⁹ *Cardenas, supra*, 263 Mich App at 518, in part quoting Judge Wilder's partial dissent in *Matic*.

³⁰ MCL 791.234(10).

reflected in the language of the statute indicating cooperation is to result in relevant and useful information, with the exception being where a prisoner had no relevant or useful information. By reading the specific language providing for that exception to also indicate that where a defendant had information it must be provided so as to be relevant and useful, a construction rendering that part of the statute surplusage or nugatory is avoided. The special panel in *Cardenas* recognized this and continuing to agree with the partial dissent of Judge Wilder in *Matelic*, the special *Cardenas* panel explained that an offer of stale information would not warrant relief for cooperation under the statute:

Similarly, the phrase "had no relevant or useful information to provide", when given its plain meaning and considered in relation to the present perfect tense clause "have cooperated," expresses the Legislature's intent that the prisoner must have lacked information before the prisoner's application for treatment under MCL 791.234(10), in order to be found as a matter of law to have cooperated.

Under the statute, then, the offer of "stale" information in an attempt to qualify for treatment under MCL 791.234(10) would fail if the evidence established that the prisoner possessed the information and could have offered it to law enforcement when it was not stale, i.e., relevant and useful, but did not do so.³¹

The *Cardenas* special panel went on to explain further the Court's interpretation that cooperation must occur when the information is "relevant and useful" to law enforcement and before a defendant seeks judicial certification of cooperation:

By the plain terms of the statute, a defendant's cooperation may not occur after the filing of a motion for a judicial determination of

³¹ *Cardenas, supra*, 263 Mich App at 518, *quoting* Judge Wilder's partial dissent in *Matelic*.

cooperation. Cooperation may be established by showing that a defendant provided information relating to his unlawful activity that was relevant and useful to law enforcement officials. Cooperation may also be established by demonstrating that the defendant never possessed information relating to his unlawful activity that was relevant and useful to law enforcement. But a defendant has not cooperated with law enforcement and, as a matter of law is not entitled to early parole under MCL 791.234(10), if the defendant possesses information that was once relevant and useful to law enforcement, but is now stale and irrelevant.³²

This interpretation is based upon the plain language of the statute and the specific section in issue that allows for expedited parole eligibility for prisoners convicted and sentenced under MCL 333.7401(2)(a)(i).

Even if the time and nature of cooperation are ambiguous under the parole statute so that the term cooperation as used in the statute is considered ambiguous, a consideration of the context and purpose of the statute supports the conclusion that a defendant must offer and provide cooperation in a timely manner so that any information or benefit from his cooperation is relevant and useful to law enforcement. Although the statute serves as means of reducing overcrowding in the prisons, it was enacted along with provisions for changing the harshness of the penalty and allows those convicted prior to changes in the law to obtain some relief when they meet the requirements.³³

³² *Cardenas, supra*, 263 Mich App at 518-519.

³³ See MCL 791.234 and authorities cited in footnotes 18 and 19, *supra*. See also *People v Fields*, 448 Mich 58, 77, 528 NW2d 176 (1995) (addressing deviation from mandatory-minimum sentences in a cocaine delivery case, the Court found that a defendant's cooperation with law enforcement should be given special attention by

A hearing to determine "cooperation" is discretionary

There is no language in the parole eligibility statute that that provides a defendant-prisoner a right to a hearing.³⁴ The Court in *Matelic*, however, held that the defendant was entitled to a hearing to determine whether he could provide to "law enforcement any specific information potentially germane to the execution of law enforcement duties."³⁵ Contrary to the *Matelic* panel's decision, the more recent special conflict panel in *People v Cardenas*, specifically disagreed with *Matelic's* conclusion that a defendant is entitled to an evidentiary hearing.³⁶ The *Cardenas* special panel explained that:

[A] trial court is not required to conduct an evidentiary hearing to determine compliance with MCL 791.234(10) upon a defendant's mere representation that he is willing to cooperate with law enforcement.³⁷

The special panel in *Cardenas* did, however, recognize that a judge has the discretionary authority to conduct a hearing in the limited circumstances where the record or documentary evidence submitted by the parties is insufficient and a genuine and material fact exists regarding whether the defendant-prisoner has

the sentencing court because it assists authorities in fighting drug-related crime and furthering the purpose of the controlled substance laws).

³⁴ MCL 791.234.

³⁵ *Matelic*, *supra*, 249 Mich App at 18.

³⁶ *Cardenas*, *supra*, 263 Mich App at 519.

³⁷ *Id.*

cooperated.³⁸ Thus, a trial court may have the discretion to hold a hearing to make a determination of cooperation, but a hearing is not required.

Application to the present case

In the present case, the record reveals there has been no cooperation with law enforcement by Defendant entitling him to a certification of cooperation for parole eligibility. Cooperation requires a joint activity and the statute reflects the fact that any cooperation must include "relevant and useful information". Although the statute allows for a defendant to be deemed to have cooperated if he had no relevant or useful information to provide, the record in this case reflects Defendant's position in a distribution scheme that required knowledge about contacts and sources that he simply refused to provide. The testimony at trial made clear that Defendant was a supplier - the person who arranged for delivery and pickup of the package containing a 998.9 grams of crystalline material proving to be 96 per cent pure cocaine - worth \$30,000 to purchase and \$90,000 upon redistribution by the ounce. (10b-11b, 20b-35b, 67b) Notably, Defendant had made arrangements for similar package deliveries on several other occasions - paying \$50 to \$100 each time for simply accepting a package. (31b-34b) In addition, police found a number of telephone contact numbers for locations in California at Defendant's residence - including a number for Ponomo - the location where the package of cocaine was shipped from in this case. (45b-49b, 62b-64b) Expert testimony revealed that

³⁸ *Id.* at 519-520.

arrangements, as in the present case, for delivery of packages containing cocaine from non-existent persons and addresses, to non-existent persons at addresses not owned or associated with the person making such arrangements is common for a mid-level distributor. (51b-52b, 66b-67b)The jury found Defendant guilty of Possession with intent to deliver cocaine over 650 grams and Conspiracy to deliver cocaine over 650 grams. (1b-2b) The facts reflect Defendant's status in the distribution and supply of cocaine beyond that of a mere mule or low-level courier. Defendant had knowledge that he could have shared with law enforcement that could potentially have led to the identification, arrest and prosecution of his cocaine supplier(s) in California, greatly contributing to the safety and welfare of the citizens of Michigan.

Prior to trial and during trial, Defendant provided no information to law enforcement. After trial, before and at sentencing, Defendant provided no information to law enforcement. Years after sentencing, years after the change in the parole statute, and years after his original motion for relief from judgment Defendant brought his motion for certification of cooperation. Based upon the facts of record, Defendant Stewart's claim in his motion that he had no information to provide beyond what his co-defendants had provided prior to his arrest is disingenuous. Defendant was the organizer, carefully orchestrating multiple deliveries in an attempt to avoid detection - including the final delivery of a large amount of cocaine from California. Defendant had the telephone contacts and address information for the California connection and supplier. Defendant Stewart

had access to large amounts of cash. The co-defendant's acted with limited knowledge at Defendant's direction and bequest. Thus, Defendant's claim that he had or has no knowledge beyond that offered by the co-defendants cannot be considered cooperation based upon the statute, when the facts reveal his active participation and involvement in planning, making contacts, and orchestrating deliveries. Nor does Defendant's current claim of cooperation, based upon turning himself in and denying any involvement in the crime, fit within the meaning of the term or the purpose of the statute. Turning himself in was Defendant's sole decision and act, not a joint act or decision for a common end, not a willing response to a request for help.

Defendant chose to provide no information to law enforcement when it would have been relevant and useful, despite his position in this drug delivery scheme as an organizer and contact person.

The People also note that contrary to the assertion in Defendant's brief that he would be eligible for parole in 15 years if he was entitled to relief under the parole eligibility statute, because he has another conviction for a serious crime, he would not be eligible for consideration until 17½ years.

D. CONCLUSION

Defendant is not entitled to judicial certification of cooperation pursuant to MCL 791.234(10).

Cooperation clearly requires joint action and consideration of all of the language in the statute reveals that cooperation must be with law enforcement.

Giving effect to all of the language in the statute reveals that where a defendant had information - it must have been provided so as to be relevant and useful. Therefore, cooperation must be timely because stale information does not satisfy the requirements of the statute. Moreover, although a judge may hold a hearing, the statute does not establish a right to a hearing.

In the present case, Defendant has not and cannot meet the requirements of MCL 791.234(10). Therefore, the trial judge properly denied his motion for certification of cooperation.

ARGUMENT II

The parole eligibility statute by its terms imposes temporal limitations by requiring that cooperation occur before a judicial determination is made and by indicating that cooperation with law enforcement must be timely by providing that information must be relevant and useful. The statute does not, however, limit when the sentencing judge must make a determination of cooperation.

A. DEFENDANT'S CLAIM

In his second claim, Defendant asserts that MCL 791.234(10) has a time limit for a Defendant's cooperation and none for when a court may make a determination that cooperation occurred. (DB10-12)

B. STANDARD OF REVIEW COUNTERSTATEMENT

As noted under Argument I, the People agree that the de novo review standard applies to statutory interpretation issues.

C. ADDITIONAL LAW & ARGUMENT

The standards that apply to interpretation of a statute are noted under Argument I.

Temporal Limitations

As also discussed under Argument I, the time when cooperation must occur may reasonably be inferred from all of the language in the parole statute. Giving effect to all of the language in the statute - the statutory language allowing for parole consideration not only references cooperation in the past tense, it reflects the legislature's intent that the cooperation result in relevant and useful information - unless the defendant had no relevant or useful information to provide. The

statutory language does not necessarily require the cooperation with law enforcement to have occurred before conviction or even necessarily before sentencing - although it may occur before then. The time when cooperation must occur, however, is limited to a time when "relevant and useful" information results from the cooperation.

A completed act is contemplated by the parole statute in referring to a prisoner who had cooperated with law enforcement. Thus, the Court of Appeals in *Matelic* incorrectly held that there was no temporal limitation on a Defendant's cooperation. The special panel in *People v Cardenas*, disagreed with the trial court conclusion in that case that a defendant must have cooperated as of the time of his conviction. The *Cardenas* Court specifically noted the limited temporal limitation found in the statute requires that a defendant must establish cooperation with law enforcement before filing a motion for judicial determination of cooperation.³⁹

The People agree that a defendant's cooperation with law enforcement as required by the statute must occur before a defendant files a motion for judicial determination of cooperation.

The statutory language indicating a successor judge may make a finding of cooperation suggests that there may be cases where such a finding can and would be made after sentencing. So there is no time frame under the statute limiting when a judge may make a finding of cooperation.

³⁹ *Cardenas, supra*, 263 Mich App at 519 n3.

D. CONCLUSION

The time when cooperation with law enforcement must occur is limited to a time when "relevant and useful" information results from the cooperation. A completed act is contemplated by the parole statute in referring to a prisoner who had cooperated with law enforcement. Thus, the language of the statute indicates the cooperation must have occurred before a judicial certification of cooperation is requested. There is no limitation, however, upon when a judge may consider a request and make a determination of cooperation.

SUMMARY AND RELIEF

Defendant has not properly preserved the parole eligibility issue because it could have been raised in his 2001 motion for relief from judgment but was not and Defendant has not established good cause for failure to raise it at that time.

The trial court properly denied Defendant's motion for certification of cooperation and Defendant's request for a hearing on the issue because Defendant did not qualify for finding of cooperation under MCL 791.234. Therefore, the Court of Appeals also properly denied Defendant's application for leave to appeal from the trial court order denying Defendant's motion for certification of cooperation and Defendant's request for a hearing on the issue.

Specific Response to each question posed by this Court

In response to each question posed by the Court in this matter, the People assert that:

1 - Cooperation for the purpose of MCL 791.234(10), requires working together for a joint purpose so that the cooperation is relevant and useful to law enforcement. Defendant in the present case is not entitled to certification for cooperation because he failed to bring a timely motion and because the record reflects his involvement in a scheme requiring knowledge and information that could have been useful to law enforcement if provided in a timely manner. Defendant, however, before and at sentencing indicated that he had nothing to tell the court and nearly ten years later claims that the co-defendants provided such information and he has no useful or relevant information to provide. His claims are

contradicted by the trial record. Defendant's assertions that he cooperated by turning himself in and not absconding are utterly ridiculous because such acts do not fall within the meaning of "cooperation."

2 - MCL 791.234(10) contains a temporal limitation on when cooperation must occur based upon the statutory language indicating cooperation must have occurred in the past. As the Court of Appeals special panel in Cardenas found cooperation must have occurred sometime before the motion for certification of cooperation and at a time when the cooperation results in relevant and useful information, unless the defendant had no relevant or useful information to provide.

3 - MCL 791.234(10) contains no temporal limitation on when a court may make a determination that cooperation has occurred. The statutory language does not necessarily require the cooperation to have occurred before conviction or even necessarily before sentencing - although it may occur before then. The statutory language indicating a successor judge may make a finding of cooperation suggests that there may be cases where such a finding can be made after sentencing.

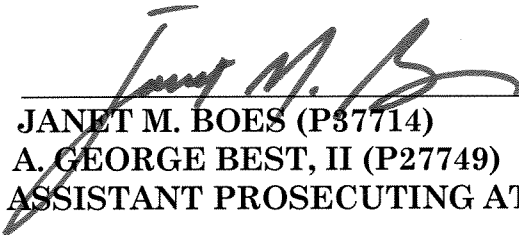
4 - *People v Matelic* was, at least in part, not properly decided because the term "cooperation" is not ambiguous as the *Matic* court concluded, because the statute does not provide or suggest cooperation means any form information potentially pertinent to law enforcement, and because stale information does not qualify under the statute as cooperation that is relevant and useful, and because the statute does not provide a right to a hearing.

5 - This case should not be remanded to the Circuit Court for an evidentiary hearing on whether Defendant cooperated because the trial record clearly reveals Defendant's position as a mid-level dealer who made all of the arrangements with sources unknown to his co-defendants. Defendant was in a position to provide useful information at or near the time of his arrest and even at the time of his conviction and sentencing, but he refused to do so. Defendant now claims to have no information. A hearing would serve no purpose in this case. Therefore, the trial judge properly exercised his discretion in denying Defendant's request for a hearing.

Defendant has failed to establish any right to relief on appeal. Therefore, the People respectfully request that this Honorable Court affirm the decisions of the trial court and the Court of Appeals in this case.

Respectfully submitted,

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Dated: January 28, 2005.